

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL
DIVERSITY and WILD FISH
CONSERVANCY,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE; BARRY THOM, Regional
Administrator of National Marine Fisheries
Service West Coast Region; WILBUR
ROSS, Secretary of Commerce,

Defendants.

Civil Action No. 19-0487

COMPLAINT

INTRODUCTION

1. Plaintiffs Center for Biological Diversity and Wild Fish Conservancy challenge the failure of the National Marine Fisheries Service, the West Coast Regional Administrator of the National Marine Fisheries Service, and the Secretary of the U.S. Department of Commerce (collectively, “Fisheries Service”) to consult on the impacts of the Pacific Coast Fishery Management Plan on critically endangered Southern Resident killer whales, also known as orcas.

1 2. These iconic creatures are a cherished symbol of the Pacific Northwest’s natural
2 and cultural heritage, yet they are struggling to survive. There are only 75 Southern Resident
3 killer whales left, including one newborn calf. The species’ alarming decline in recent years
4 means that time is running out to prevent extinction.

5 3. Until a few months ago, Southern Resident killer whales had failed to successfully
6 reproduce since 2015. Over 40 percent of newborn calves do not survive their first few years. In
7 July 2018, a newborn calf lived for just under an hour. Her grieving mother, named Tahlequah,
8 carried her body for 17 days over hundreds of miles.

9 4. The most recent known death, which occurred in September 2018, was a three-
10 year old Southern Resident killer whale named Scarlet who had been struggling to survive for
11 months. She was one of the few females of reproductive age remaining in the population.
12 Though her body has not been recovered, Fisheries Service scientists presume she is dead, and
13 her body likely sank to the seafloor because she had become so thin and had very little blubber
14 remaining.

15 5. Researchers have been closely watching two other ailing Southern resident killer
16 whales, Princess Angeline (a 42-year old female that is Tahlequah’s mother) and Scooter (a 28-
17 year old male). Both whales appear to be malnourished and show signs of “peanut head,” where
18 an individual has lost so much of its body fat that a depression appears behind its blowhole.

19 6. In early January 2019, scientists confirmed a welcome new addition, a baby orca
20 named Lucky, who was spotted swimming alongside its mother. Lucky is the first calf to survive
21 past birth since 2015. Lucky and its mother are part of the L pod, the largest of the three pods (J,
22 K, and L) that make up the Southern Resident killer whale population, each with its own distinct
23 dialect of sounds it uses to communicate. Just this past week, the L pod was sighted in Monterey
24 Bay, California, highlighting the expansive range of these orcas.

1 7. The primary threats to Southern Resident killer whales are starvation from lack of
2 adequate prey (predominately Chinook salmon), vessel noise and disturbance that interferes with
3 key foraging and other essential behaviors, and toxic contaminants that bioaccumulate in the
4 orcas' fat. Scientists recently concluded that of these three major threats to Southern Resident
5 killer whales, prey depletion has the biggest impact on reproductive success and survival.

6 8. The Pacific Coast Fishery Management Plan ("Pacific Salmon Plan") governs
7 management of commercial and recreational salmon fisheries in federal waters off the coast of
8 Washington, Oregon, and California from 3 to 200 nautical miles offshore. The Pacific Salmon
9 Plan is adopted by the Pacific Fishery Management Council and approved by the Secretary of
10 Commerce. It contains management measures and allocation provisions for Chinook, coho, and
11 pink salmon. The Council first issued a Pacific Salmon Plan in 1977. The current version of the
12 Pacific Salmon Plan consists of the 1984 comprehensive framework amendment of the Plan
13 through the most recent Amendment 19, approved by the Secretary of Commerce in 2016.

14 9. Fisheries authorized under the Pacific Salmon Plan reduce the abundance of the
15 Southern Resident killer whales' predominant prey by over 300,000 Chinook per year and can
16 directly interfere with feeding behavior, which causes the orcas to forage for longer periods, to
17 travel to alternate locations, or to abandon foraging efforts.

18 10. The Fisheries Service continues to rely on an outdated 2009 biological opinion to
19 authorize salmon fisheries along the West coast under the Pacific Salmon Plan. From 2009 to
20 present, scientists have produced significant new information about Southern Resident killer
21 whales, the reasons for their decline from 85 animals in 2009 to just 75 today, their relationship
22 to salmon, and the impacts of prey depletion on their survival and recovery.

23 11. The Fisheries Service's failure to reinitiate and complete consultation on the
24 impacts of the Pacific Salmon Plan fisheries on Southern Resident killer whales violates the

1 Endangered Species Act. The Fisheries Service is failing to ensure that its authorization of
 2 Pacific Coast salmon fisheries under the Pacific Salmon Plan does not jeopardize the survival
 3 and recovery of Southern Resident killer whales.

4 12. Accordingly, Plaintiffs seek an order from this Court establishing a prompt
 5 deadline for the Fisheries Service to reinitiate and complete consultation for Southern Resident
 6 killer whales and to implement mitigation measures to benefit the orcas.

7 **JURISDICTION AND VENUE**

8 13. This Court has jurisdiction over this action pursuant to: 28 U.S.C. § 1331, because
 9 this action arises under the laws of the United States, including the Endangered Species Act
 10 (ESA), 16 U.S.C. § 1531, *et seq.* and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-
 11 706; 28 U.S.C. § 1346 (action against the United States); and 28 U.S.C. § 1361 (action to compel
 12 an officer of the United States to perform his or her duty). An actual, justiciable controversy now
 13 exists between Plaintiffs and Defendants, and the requested relief is proper under 28 U.S.C. §§
 14 2201-02, 5 U.S.C. §§ 701-706, and 16 U.S.C. § 1540(g).

15 14. Venue is proper in this district under 28 U.S.C. § 1391(e). This action is brought
 16 against an agency of the United States and officers of the United States acting in their official
 17 capacities. Defendants maintain offices in the Western District of Washington, and the legal
 18 violations are occurring in this district.

19 15. Plaintiffs provided the Secretary of Commerce and the Regional Administrator of
 20 the National Marine Fisheries Service with notice of the ESA violations more than 60 days prior
 21 to the commencement of this case.

22 **INTRADISTRICT ASSIGNMENT**

23 16. Pursuant to Civil Local Rule 3(e), this action is properly assigned to the Seattle
 24 Division of this district, because a substantial part of the events or omissions giving rise to

1 Plaintiffs' claims occurred in King County and Defendant National Marine Fisheries Service
2 maintains its West Coast Regional office in King County.

3 **PARTIES**

4 **Plaintiffs**

5 17. Plaintiff Center for Biological Diversity ("Center") is a nonprofit corporation that
6 advocates for the protection of threatened and endangered species and their habitats through
7 science, policy, and environmental law. The Center's Oceans Program focuses specifically on
8 conserving marine wildlife and habitat. In pursuit of this mission, the Center has been actively
9 involved in securing protections for imperiled marine mammals, including Southern Resident
10 killer whales. In 2001, the Center filed a petition to list Southern Resident killer whales as an
11 endangered species under the ESA, and through legal action it secured such protections for this
12 population. The Center also has engaged in longstanding efforts to protect the habitat of
13 Southern Resident killer whales from water and noise pollution, disturbance from vessels, the
14 risk of offshore oil drilling activities and spills, and other threats.

15 18. The Center has more than 69,543 members, many of whom live on the West Coast
16 of the United States. The Center brings this action on behalf of itself and its members. Center
17 members and staff live near and regularly visit the inland waters and coastal habitat of Southern
18 Resident killer whales to observe, photograph, study, and otherwise enjoy Southern Resident
19 killer whales and their habitat. Center members have an interest in Southern Resident killer
20 whales and their habitat, including waters around the San Juan Islands and along the Pacific
21 Coast. For example, Center members regularly sail, kayak, and go whale watching to enjoy the
22 marine habitat and look for and photograph Southern Resident killer whales. Center members
23 and staff derive recreational, spiritual, professional, scientific, educational, and aesthetic benefits
24 from the presence of Southern Resident killer whales and their habitat. Center members and staff

1 intend to continue to frequently engage in these activities and to use and enjoy Southern Resident
2 killer whales' habitat in the future.

3 19. Plaintiff Wild Fish Conservancy is a 501(c)(3) member-based conservation
4 ecology organization incorporated in the State of Washington in 1989. Wild Fish Conservancy
5 works on a wide range of science-based projects consistent with its mission throughout the
6 Northwest from California to Alaska. Wild Fish Conservancy is dedicated to the preservation
7 and recovery of all native fish species and the marine and freshwater habitats they depend
8 on. Wild Fish Conservancy is also committed to the preservation and recovery of the larger
9 ecosystems that play a fundamental role in the survival and evolution of wild fish, including but
10 not limited to key predators such as Southern Resident killer whales.

11 20. Wild Fish Conservancy brings this action on behalf of itself and its
12 approximately 4,620 members. As a science-based environmental watchdog, Wild Fish
13 Conservancy actively informs the public on matters affecting wild fish in the Northwest through
14 publications, commentary to the press, and sponsorship of educational programs. Wild Fish
15 Conservancy also conducts field research and habitat restoration projects and publishes technical
16 papers. Wild Fish Conservancy has advocated, litigated, and publicly commented on federal and
17 state actions that affect the region's native fish, the habitat on which they depend, and the greater
18 ecosystem, including Southern Resident killer whales. Wild Fish Conservancy routinely seeks to
19 compel government agencies to follow the laws designed to protect native fish species and other
20 marine and freshwater species, particularly those recognized as threatened and endangered.

21 21. Wild Fish Conservancy's members regularly spend time in areas in and around the
22 waters occupied by Southern Resident killer whales, including waters around the San Juan
23 Islands, Strait of Juan de Fuca, and along the Pacific Coast. Wild Fish Conservancy's members
24 intend to continue to visit these areas to use, enjoy, and experience Southern Resident killer

1 whales on a regular basis, including in the coming months and beyond. These members observe,
2 study, photograph, and appreciate wildlife and wildlife habitat in and around these waters. These
3 members also fish, hike, camp, boat, scuba dive, and swim in and around these waters.

4 22. Wild Fish Conservancy's members derive scientific, educational, recreational,
5 health, conservation, spiritual, and aesthetic benefits from the inland waters and coastal habitat of
6 Southern Resident killer whales, as well as wild native fish species in those waters, and from the
7 existence of natural, wild, and healthy ecosystems.

8 23. The Fisheries Service's failure to reinitiate and complete consultation for Southern
9 Resident killer whales using the best scientific data available fails to ensure that its actions do not
10 jeopardize the continued existence of the endangered Southern Resident killer whales and
11 deprives the species of additional protections that are vitally important to its survival and
12 eventual recovery. The Fisheries Service's failure to reinitiate and complete consultation
13 diminishes the aesthetic, recreational, spiritual, scientific, and other interests of Plaintiffs and
14 their members, because without action, Southern Resident killer whales are more vulnerable to
15 the impacts of insufficient prey availability, which also compounds their vulnerability to vessel
16 disturbance and pollution.

17 24. The absence of an updated consultation process and biological opinion places
18 Southern Resident killer whales at greater risk of extinction and reduces their chances of survival
19 and recovery. Since the last consultation in 2009, the population has declined from 85 to 75
20 individuals, a loss of over ten percent of the population. The Plaintiffs and their members are
21 injured, because their use and enjoyment of Southern Resident killer whales and those areas
22 inhabited by the whales are threatened, degraded, and harmed by the Fisheries Service's failure
23 to ensure that its actions are not likely to jeopardize the continued existence of the endangered
24 Southern Resident killer whales.

25. In addition, the Plaintiffs and their members are also suffering procedural and informational injuries. The Plaintiffs and their members regularly comment on agency actions with respect to fishing activities that are likely to adversely affect Southern Resident killer whales. The Fisheries Service's ongoing failure to publish a biological opinion subverts the ability of the Plaintiffs and their members to meaningfully participate in the fisheries management rulemaking process. It also deprives the Plaintiffs and their members of additional scientific and other information regarding the health of the Chinook salmon stocks most essential for the survival and recovery of Southern resident killer whales.

26. The above-described cultural, spiritual, aesthetic, recreational, scientific, educational, procedural, and other interests of the Plaintiffs and their members have been, are being and, unless the relief requested herein is granted, will continue to be adversely affected and irreparably injured by the Fisheries Service's failure to reinitiate and complete consultation and to ensure it is not jeopardizing Southern Resident killer whales.

27. The relief sought in this case will redress these injuries. Reinitiation and completion of consultation will ensure that the Fisheries Service considers and makes public the best available science in determining whether its actions are likely to jeopardize the continued existence of the endangered Southern Resident killer whales. Through this process, the Fisheries Service can assess the effects of the coastal fisheries on Southern Resident killer whales and develop short- and long-term approaches to improving prey abundance and availability for the orcas. This will increase the chances of Southern Resident killer whale survival and recovery, which in turn will protect Plaintiffs' and their members' enjoyment of and interests in the species and its habitat.

Defendants

28. Defendant National Marine Fisheries Service is an agency within the U.S.

1 Department of Commerce. The National Marine Fisheries Service is the agency to which the
 2 Secretary of Commerce has delegated the authority to manage endangered marine mammals,
 3 including Southern Resident killer whales. The National Marine Fisheries Service was the
 4 “Action Agency” on the 2009 Endangered Species Act Section 7(a)(2) Consultation Biological
 5 Opinion on the Effects of the Pacific Coast Salmon Plan on Southern Resident Killer Whale
 6 (*Orcinus orca*) Distinct Population Segment.

7 29. Defendant Barry Thom is named in his official capacity as the West Coast
 8 Regional Administrator of the National Marine Fisheries Service. Regional Administrator Thom
 9 has responsibility at the regional level for implementing and fulfilling the agency’s duties to
 10 manage endangered marine mammals. The National Marine Fisheries Service, Northwest Region
 11 conducted the Consultation on the 2009 Endangered Species Act Section 7(a)(2) Consultation
 12 Biological Opinion on the Effects of the Pacific Coast Salmon Plan on the Southern Resident
 13 Killer Whale (*Orcinus orca*) Distinct Population Segment. Regional Administrator Thom signed
 14 and issued the 2009 Biological Opinion.

15 30. Defendant Wilbur Ross is named in his official capacity as the Secretary of
 16 Commerce. The Secretary is vested with authority over endangered marine mammals under the
 17 Endangered Species Act. The Secretary has the duty and authority to conserve and recover
 18 Southern Resident killer whales and is responsible for the violations alleged in this case. The
 19 Secretary has the ultimate duty and authority to issue the relief requested in this complaint.

20 **STATUTORY BACKGROUND**

21 **The Endangered Species Act**

22 31. When Congress enacted the Endangered Species Act (ESA), it recognized that
 23 some species of fish, wildlife, and plants have been “so depleted in numbers that they are in
 24 danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(2). It stated that “these species of

1 fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and
 2 scientific value to the Nation and its people.” *Id.* § 1531(a)(3).

3 32. Congress enacted the ESA, in part, to provide a “means whereby the ecosystems
 4 upon which endangered species and threatened species depend may be conserved.” *Id.* § 1531(b).
 5 The ESA established that it is “the policy of Congress that all Federal departments and agencies
 6 shall seek to conserve endangered species and threatened species and shall utilize their
 7 authorities in furtherance of the purposes of this Act.” *Id.* § 1531(c)(1). The ESA defines
 8 “conservation” to mean “the use of all methods and procedures which are necessary to bring any
 9 endangered species or threatened species to the point at which the measures provided pursuant to
 10 this Act are no longer necessary.” *Id.* § 1532(3).

11 33. The ESA protects imperiled species by listing them as “endangered” or
 12 “threatened.” *Id.* § 1533. A species is “endangered” if it “is in danger of extinction throughout all
 13 or a significant portion of its range.” *Id.* § 1532(6). The Secretary of Commerce is charged with
 14 administering and enforcing the ESA for most marine species, including Southern Resident killer
 15 whales, and has delegated this responsibility to the Fisheries Service. 50 C.F.R. § 402.01(b).

16 34. Under the ESA, the Secretary of Commerce is also required to develop and
 17 implement recovery plans for the conservation and survival of endangered and threatened
 18 species. 16 U.S.C. § 1533(f). A recovery plan defines actions that are considered necessary to the
 19 conservation and survival of a listed species.

20 35. Section 9 of the ESA generally makes it unlawful for “any person” to “take” an
 21 endangered species. *Id.* § 1538(a)(1). A “person” includes private parties as well as local, state,
 22 and federal agencies. *Id.* § 1532(13). The ESA defines “take” to mean “harass, harm, pursue,
 23 hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
 24 *Id.* § 1532(19). “Harm” is defined broadly by regulation as “an act which actually kills or injures

1 wildlife. Such act may include significant habitat modification or degradation where it actually
2 kills or injures wildlife by significantly impairing essential behavioral patterns, including
3 breeding, feeding or sheltering.” 50 C.F.R. § 222.102.

4 36. Under Section 7(a)(2) of the ESA, the Fisheries Service must ensure that any
5 action it authorizes, funds, or carries out is “not likely to jeopardize the continued existence of
6 any endangered species.” 16 U.S.C. § 1536(a)(2).

7 37. ESA regulations define “[j]eopardize the continued existence of” as “to engage in
8 an action that reasonably would be expected, either directly or indirectly, to reduce appreciably
9 the likelihood of both the survival and recovery of a listed species in the wild by reducing the
10 reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Recovery is defined
11 as “improvement in the status of listed species to the point at which listing is no longer
12 appropriate.” *Id.*

13 38. When an agency determines that its proposed action “may affect listed species” it
14 must engage in formal consultation for the species at issue using “the best scientific and
15 commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

16 39. Where, as here, the Fisheries Service is both the action agency and the expert
17 agency, it must undertake internal consultation before authorizing any fisheries that may affect
18 Southern Resident killer whales. The consulting branch of the Fisheries Service must issue a
19 biological opinion explaining how the proposed action will affect the ESA-listed species and
20 determine whether jeopardy is likely to occur. *Id.* § 402.14(g)(3), (4).

21 40. A jeopardy analysis requires the agency to consider the aggregate effect of past
22 and ongoing human activities that affect the current status of the species and its habitat
23 (“environmental baseline”); the indirect and direct effects of the proposed action, including the
24 effects of interrelated and interdependent activities (“effects of the action”); and the effects of

1 future state and private activities that are reasonably certain to occur (“cumulative effects”). *Id.*
2 §§ 402.02, 402.14(g). The Fisheries Service must consider all of these factors in context of the
3 current status of the species and its habitat. *Id.* § 402.14(g).

4 41. If jeopardy is found, the biological opinion shall suggest “reasonable and prudent
5 alternatives” to the proposed action that the Fisheries Service believes would avoid the
6 likelihood of jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.14(h), 402.02.

7 42. If the Fisheries Service concludes the action may take listed members of the
8 population, but the action will not jeopardize the population, the agency must produce an
9 Incidental Take Statement (“ITS”) that specifies the impact of the action by setting a numeric
10 limit on take (or a surrogate if a numeric cap is impractical to establish) and identifies
11 “reasonable and prudent measures” that will minimize impacts and “terms and conditions” to
12 implement these measures. 16 U.S.C. § 1536(b)(4)(C); 50 C.F.R. § 402.14(i).

13 43. The take of a listed species in compliance with the terms of a valid ITS is not
14 prohibited under Section 9 of the ESA. 16 U.S.C. §§ 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5).

15 44. After consultation is completed, if a biological opinion fails to comply with the
16 ESA’s standards, the action agency may not rely on it to satisfy its Section 7 duties.

17 45. In addition, the action and consulting agencies must review the ongoing impacts of
18 the action and reinitiate consultation if the effects on species exceed or are different than
19 expected. Specifically, reinitiation is required when: (a) the amount or extent of taking specified
20 in the ITS is exceeded; (b) new information reveals effects of the action that may affect listed
21 species or critical habitat in a manner or to an extent not previously considered; (c) if the
22 identified action is subsequently modified in a manner that causes an effect to the listed species
23 or critical habitat that was not considered in the biological opinion; or (d) if a new species is
24 listed or critical habitat designated that may be affected by the identified action. 50 C.F.R.

1 § 402.16.

2 46. Both the action agency and the consulting agency have a duty to reinstate
3 consultation.

4 47. The ESA specifies that Section 7 consultation must typically be completed within
5 ninety days of its initiation. 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e). The agency's duty to
6 ensure against jeopardy remains in effect regardless of the status of consultation.

7 **Administrative Procedure Act**

8 48. The Administrative Procedure Act (APA) governs the judicial review of federal
9 agency actions. 5 U.S.C. §§ 701–706.

10 49. Under the APA, courts shall “compel agency action unlawfully withheld or
11 unreasonably delayed,” *id.* § 706(1), and “hold unlawful and set aside agency action, findings, or
12 conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in
13 accordance with law” or made “without observance of procedure required by law.” *Id.* §
14 706(2)(A), (D). Agency action includes an agency's “failure to act.” *Id.* § 551(13).

15 **FACTUAL BACKGROUND**

16 **Southern Resident Killer Whales**

17 50. Southern Resident killer whales, also known as orcas, are charismatic black and
18 white marine mammals that are an icon of the Pacific Northwest. They are intelligent, social
19 animals that live in highly organized groups known as pods. These killer whales form strong
20 social bonds and have been observed sharing the responsibilities of caring for the young, sick,
21 and injured.

22 51. Southern Resident killer whales are distinct from other killer whales. They are
23 residents of the Salish Sea and have a unique dialect and diet. Their diet consists entirely of fish,
24 primarily Chinook salmon.



Figure 1. *Southern Resident killer whales (NOAA Fisheries West Coast 2015)*

52. Southern Resident killer whales spend an average of 244 days per year in coastal waters and 122 days in inland waters according to the Fisheries Service. Each orca consumes a rough estimate of 25 salmon per day or 684,375 salmon per year for the current population of 75 individuals.

53. The Fisheries Service listed Southern Resident killer whales as “endangered” under the ESA in 2005. 70 Fed. Reg. 69,903 (Nov. 18, 2005). The Fisheries Service designated “critical habitat” for the population in 2006. 50 C.F.R. § 226.206; 71 Fed. Reg. 69,054 (Nov. 29, 2006).

54. Southern Resident killer whales have continued to decline since their 2005 listing as endangered. The species is now at grave risk of extinction. Four deaths since December 2016 have reduced the J, K, and L pods that make up the Southern Resident killer whale population to only 75 whales.

55. The Fisheries Service and other scientists have identified the primary threats to Southern Resident killer whales as: (1) starvation from lack of availability of prey; (2) vessel

1 noise and disturbance that interrupt key foraging and other behaviors; and (3) toxic contaminants
2 from pollution that bioaccumulate and are stored in the whales' fat. Killer whales use sound and
3 echolocation to find prey; noise pollution can mask the clicks that they use to locate prey.

4 56. In 2008, the Fisheries Service issued a recovery plan for Southern Resident killer
5 whales. The recovery plan identified prey availability as a threat to the killer whales. The plan
6 prioritized the management of this threat through salmon restoration efforts in the region,
7 including habitat, harvest, and hatchery management considerations, and the continued use of
8 existing Fisheries Service authorities under the ESA and Magnuson-Stevens Fishery
9 Conservation and Management Act "to ensure an adequate prey base."

10 57. The 2008 recovery plan specified that an important criteria for evaluating whether
11 recovery has been achieved will be if the Fisheries Service has sufficient knowledge of the
12 foraging ecology of Southern Residents "to determine that established fishery management
13 regimes are not likely to limit the recovery of the whales." The plan elaborates that this would
14 include "[f]isheries management programs that adequately account for predation by marine
15 mammal populations when determining harvest limits, hatchery practices, and other parameters."

16 58. In 2014, a population viability study estimated that under status quo conditions, the
17 Southern Resident killer whales growth rate was a 0.91% annual decline, meaning it would reach
18 an expected population size of 75 by 2036. This abundance was reached in mid-2018.

19 59. In 2015, the Fisheries Service identified Southern Resident killer whales as a
20 "Species in the Spotlight," due to its high risk of extinction. The Fisheries Service selected just
21 eight Species in the Spotlight, choosing those marine species for which "immediate, targeted
22 efforts are vital for stabilizing their populations and preventing their extinction." The Fisheries
23 Service ranked Southern Resident killer whales as a "recovery priority #1."

24 60. Scientists have since concluded that insufficient availability of prey is a critical

factor causing poor body condition, nutritional stress, and the decline of the Southern Resident killer whales. Nutritional stress leads to fat metabolism and the subsequent release of stored toxins, which can contribute to further stress and reproductive failure.

61. In 2017, scientists conducted a population viability assessment that considered the sub-lethal effects and cumulative impacts of contaminants, acoustic disturbance, and prey abundance and tested a range of scenarios. They concluded that the effects of prey abundance on fecundity and survival had the largest impact on Southern Resident killer whales' population growth rate.

62. A 2017 review of recent scientific research similarly concluded that prey limitation is the most likely cause of poor body condition in Southern Resident killer whales.

Ocean Salmon Fisheries Affect Southern Resident Killer Whales

63. Southern Resident killer whales spend almost two-thirds of the year in coastal waters, mostly from early fall through spring. During this period, Southern Resident killer whales' body condition tends to decline.

64. Scientists have stated that coastal abundance of Chinook salmon during non-summer months is likely more important for the successful survival and reproduction of Southern Resident killer whales than Chinook abundance in coastal waters during the summer months.

65. Federally-managed Pacific Ocean salmon fisheries harvest primarily Chinook and coho salmon under the framework of the Pacific Coast Salmon Fishery Management Plan ("Pacific Salmon Plan").

66. The federally-managed salmon fisheries catch fish from many stocks of salmon along the California, Oregon, and Washington coasts that have been identified by the Fisheries Service as priority prey for the critically endangered and depleted Southern Resident killer

whales. Fisheries can also directly interfere with Southern Resident killer whales feeding by producing noise and other physical disturbance.

67. These coastal salmon fisheries are depleting the salmon stocks at a level that is biologically significant to the orcas. The Pacific Fishery Management Council reported over 250,000 Chinook caught in commercial and recreational fisheries in 2018, with an additional 65,000 Chinook mortalities reported from bycatch.

68. One recent scientific report estimated that ocean salmon fisheries reduce Chinook abundance by 18-25 percent. A second scientific study projected that a 15 percent increase in coastal Chinook along with a reduction in noise disturbance would allow Southern Resident killer whales to reach the growth target needed for recovery.

The Fisheries Service Continues to Rely on an Outdated 2009 Biological Opinion for Southern Resident Killer Whales

69. After the Fisheries Service listed Southern Resident killer whales as endangered under the ESA in 2005, it completed three consecutive annual consultations to evaluate the effects of the Pacific Salmon Plan fisheries on the orcas.

70. In 2009, the Fisheries Service completed a long-term biological opinion for the Pacific Salmon Plan and Southern Resident killer whales (“2009 Biological Opinion”) that the Fisheries Service stated would remain effective “until reinitiation is deemed necessary.”

71. In the 2009 Biological Opinion, the Fisheries Service stated that “any Federal action that is likely to hinder the reproductive success or increase the risk of mortality of a single individual is likely to appreciably reduce the survival and recovery of the DPS” and the Fisheries Service must therefore “scrutinize even small effects on the fitness of individuals that increase the risk of mortality or decrease the chances of successful reproduction.”

72. The 2009 Biological Opinion stated that it was unknown whether lack of prey was

1 limiting the ability of Southern Resident killer whales to survive and recover. It concluded that
2 while the annual ocean salmon fisheries could result in some level of harm to all Southern
3 Resident killer whales by reducing prey and thus causing animals to forage for longer periods,
4 travel to alternate locations, or abandon foraging efforts, the fisheries were not likely to
5 jeopardize the continued existence of Southern Resident killer whales or adversely modify their
6 critical habitat.

7 73. The 2009 Biological Opinion did not place any numerical or other surrogate value
8 on the extent of Southern Resident killer whale take authorized, which would have served as a
9 trigger for reinitiation based on exceeded take. Instead, the Fisheries Service restated the
10 regulatory requirement that it would reinitiate consultation if: (1) the amount or extent of
11 incidental take is exceeded; (2) new information reveals effects of the action that may affect
12 listed species or critical habitat in a manner or to an extent not previously considered; (3) the
13 identified action is subsequently modified in a manner that causes an effect to listed species or
14 critical habitat that was not considered in the biological opinion; or (4) a new species is listed or
15 critical habitat designated that may be affected by the identified action.

16 74. The Fisheries Service has not issued a biological opinion on the impacts of the
17 Pacific Coast salmon fisheries on Southern Resident killer whales since 2009 when the
18 population stood at 85 individuals. The population has declined from 85 animals in 2009 to 75
19 animals today.

20 75. The Fisheries Service continues to rely on the 2009 Biological Opinion to
21 authorize the annual Pacific salmon fisheries.

76. The Fisheries Service retains discretionary involvement and control over Pacific salmon fisheries. This discretion can be used for the benefit of Southern Resident killer whales.

CLAIMS FOR RELIEF

First Claim for Relief **Violation of the ESA – Failure to Reinitiate and Complete Consultation**

77. Plaintiffs re-allege and incorporate, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

78. The Fisheries Service has failed to reinitiate and complete consultation on the impacts of its authorization of Pacific Coast salmon fisheries under the Pacific Salmon Plan on Southern Resident killer whales. This violates Section 7 of the ESA and its implementing regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(e), 402.16.

79. The Fisheries Service’s failure to reinitiate and complete consultation on the impacts of its authorization of Pacific Coast salmon fisheries under the Pacific Salmon Plan on Southern Resident killer whales constitutes arbitrary and capricious agency action, agency action “unlawfully withheld or unreasonably delayed,” and/or agency action made “without observance of procedure required by law” under the APA. 5 U.S.C. §§ 706(1), 706(2)(A), (D).

Second Claim for Relief **Violation of the ESA – Failure to Ensure Against Jeopardy**

80. Plaintiffs re-allege and incorporate, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

81. By continuing to rely on an outdated Biological Opinion from 2009, the Fisheries Service is failing to ensure that its authorization of Pacific Coast salmon fisheries under the Pacific Salmon Plan is not likely to jeopardize the continued existence of Southern Resident killer whales. This violates Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2).

REQUEST FOR RELIEF

For the reasons stated above, Plaintiffs respectfully request that this Court:

1. Declare that the Fisheries Service has violated and continues to violate Section 7 of the ESA and its implementing regulations by failing to reinitiate and complete consultation on the impact of its authorization of fisheries under the Pacific Salmon Plan on Southern Resident killer whales;

2. Declare that the Fisheries Service has violated and continues to violate Section 7(a)(2) of the ESA by failing to ensure that its authorization of fisheries under the Pacific Salmon Plan does not jeopardize the continued existence of Southern Resident killer whales;

3. Declare that the Fisheries Service has violated and continues to violate the APA by failing to reinitiate and complete consultation on the impact of its authorization of fisheries under the Pacific Salmon Plan on Southern Resident killer whales;

4. Order the Fisheries Service to reinitiate consultation within 30 days;

5. Order the Fisheries Service to complete consultation within 90 days of reinitiation;

6. Order the Fisheries Service to implement additional mitigation measures to reduce the risk of insufficient prey abundance and availability for Southern Resident killer whales;

7. Award Plaintiffs the costs of this litigation, including reasonable attorneys' fees; and

8. Grant such other relief as may be just and proper.

1 Respectfully submitted this 3rd day of April 2019

2 /s/ Sarah Uhlemann

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